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MB 04-160

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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Establishment of Rules and Policies	)	
For the Digital Audio Radio Satellite	)	IB Docket No. 95-91
Service in the 2310-2360 MHz	)	GEN Docket No. 90-357
Frequency Band	)	
Radio Service Terrestrial Repeaters Network	)	

NATIONAL ASSOCIATION OF BROADCASTERS PETITION FOR DECLARATORY RULING

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") submits this Petition for Declaratory Ruling. Earlier this year, XM Radio, Inc. ("XM") and Sirius Satellite Radio, Inc. ("Sirius") announced that they would begin delivering local traffic and weather reports. This foray into local content is directly contrary to the SDARS licensees' repeated and express promises that satellite radio service would be limited to delivering national programming to serve the unserved and underserved, and is contrary to the Commission's explicit understanding of the limits on SDARS service – limits that were critical to the Commission's decision to authorize SDARS in the first place.

In lieu of the promised niche audiences, foreign language services, senior and children's programming, they have instead devoted substantial bandwidth to compete directly with local broadcasters with local content, without being subject to any public interest obligations. This is not "local broadcasting" but instead centralized content stemming from two companies. The Communications Act of 1934 calls for "providing a fair, efficient and equitable distribution of broadcast services." 47 U.S.C. § 2(a)(9). "Localized" pay service, implemented in stark contrast to both the promised "rules of the road," is inherently contrary to the goal of "fair and efficient" distribution of local broadcast services. A centralized "localized" service, which is essentially duplicative of existing programming, does little to foster diversity and localism: it can exist only to the detriment of the dissemination of free and over-the-air local services to local communities.

Further, although technology has rapidly developed since the 1997 SDARS authorization, the Commission must ensure that XM and Sirius do not utilize new technology to change the fundamental nature of satellite radio service. NAB is particularly concerned that XM and Sirius may be actively developing a next generation of SDARS receivers that can deliver "localized" programming, including advertisements, news, etc., to its subscribers by using Global Positioning Satellite ("GPS") and store-and-forward technologies. Using these technologies, an SDARS provider could, for example, beam to its listeners local content feeds (*i.e.*, using excess bit stream capacity outside of the active audio streams) to be stored in memory chips or hard disk drives of next generation receivers. In turn, these receivers would be capable, based either on the geographic position of the receiver or by other information such as the listener's subscriber number, of filtering and placing into the listener's audience stream, at specified times (*e.g.*, commercial breaks), local content that is tailored to the listener's location.

By these means, the SDARS licensees will be able to "localize" their services in an effort to make them indistinguishable from local radio. Before XM and Sirius invest millions of dollars in technology, the Commission must clarify that in authorizing SDARS licensees, the FCC authorized a national, not a local broadcasting service.

Thus, NAB urges the Commission to make clear that satellite digital audio radio service ("SDARS") providers are prohibited from: (1) using any technology to permit the delivery of content that would be aired on a receiver in one location that differs from the content that would be aired on a receiver in a different location; and (2) providing locally oriented services on nationally distributed channels. Alternatively, the Commission

should re-open the SDARS proceeding to evaluate the impact of the service on local broadcasting, a finding the FCC specifically did not make in the 1997 *Report and Order* since SDARS was to be a national-only service.

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To: The Commission

NATIONAL ASSOCIATION OF BROADCASTERS' PETITION FOR DECLARATORY RULING

I. Introduction.

The National Association of Broadcasters ("NAB")[1] submits this Petition for Declaratory Ruling in the above-captioned proceeding. NAB urges the Commission to make clear that satellite digital audio radio service ("SDARS") providers are prohibited from: (1) using any technology to permit the delivery of content that would be aired on a receiver in one location that differs from the content that would be aired on a receiver in a different location; and (2) providing locally oriented services on nationally distributed channels.

Earlier this year, XM Radio, Inc. ("XM," formerly American Mobile Radio Corporation or AMRC) and Sirius Satellite Radio, Inc. ("Sirius," formerly Satellite CD Radio, Inc. or CD

[1] NAB is a nonprofit, incorporated association that serves and represents America's radio and television broadcast stations.

Radio, Inc.) announced that they would begin delivering local traffic and weather reports.[2] This foray into local content is directly contrary to the SDARS licensees' repeated and express promises that satellite radio service would be limited to delivering national programming to serve the unserved and underserved, and is contrary to the Commission's explicit understanding of the limits on SDARS service – limits that were critical to the Commission's decision to authorize SDARS in the first place.

Although technology has rapidly developed since the 1997 SDARS authorization, the Commission must ensure that XM and Sirius do not utilize new technology to change the nature of satellite radio service. NAB is particularly concerned that XM and Sirius may be actively developing a next generation of SDARS receivers that can deliver "localized" programming, including advertisements, news, etc., to its subscribers by using Global Positioning Satellite ("GPS") and store-and-forward technologies. Using these technologies, an SDARS provider could, for example, beam to its listeners local content feeds (*i.e.*, using excess bit stream capacity outside of the active audio streams) to be stored in memory chips or hard disk drives of next generation receivers. In turn, these receivers would be capable, based either on the geographic position of the receiver or by other information such as the listener's subscriber number, of filtering and placing into the listener's audience stream, at specified times (*e.g.*, commercial breaks), local content that is tailored to the listener's location.

By these means, the SDARS licensees will be able to "localize" their services in an effort to make them indistinguishable from local radio. Before XM and Sirius invest millions of

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[2] *See* http://www.xmradio.com/traffic/index.jsp/ (last visited March 15, 2004); http://www.siriusradio.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Pres... (last visited March 15, 2004).

dollars in technology, the Commission must clarify that in authorizing SDARS licensees, the FCC authorized a national, not a local broadcasting service. Alternatively, the Commission should re-open the SDARS proceeding to evaluate the impact of the service on local broadcasting, a finding the FCC specifically did not make in the 1997 *Report and Order* since SDARS was to be a national-only service.

II. The Commission Authorized Satellite Radio Based On The Repeated Promises of a Unique, Complementary and National-Only Service.

In 1990, Sirius filed a Petition for Rulemaking to allocate spectrum for SDARS.[3] Sirius' business plan was for a "complementary satellite and terrestrial" hybrid system: local radio stations could be uplinked via high-quality terrestrial optic fiber links, and ten national channels would be provided, "designed to supplement, not to supplant, terrestrial broadcasting services."[4] In November 1991, the Commission released a *Notice of Proposed Rulemaking and Further Notice of Inquiry* proposing to allocate the spectrum at 2310-2360 MHz for SDARS.[5] Relying on SDARS advocates' assurances, the Commission stated that the public policy benefit "[a]s suggested by some proponents, [was that] a satellite DARS system has the potential to provide

[3] Application of Satellite CD Radio, Inc. For A Private CD Quality Satellite Sound Broadcasting System, May 18, 1990.

[4] *Id. See also* In the Matter of Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Comments of Radio Satellite Corporation, Docket No. 90-357, Nov. 13, 1990 at 35 (in which another DARS proponent contemplated "rebroadcast" of AM and FM programming through a "network center.")

[5] In the Matter of Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, *Notice of Proposed Rulemaking and Further Notice of Inquiry*, 7 FCC Rcd 7776 (1992) at ¶ 22.

new services to rural listeners, minority and ethnic groups, and audiences whose first language is not English." [6]

The SDARS applicants subsequently shifted the focus of satellite radio from their hybrid proposal to a national-only service, to provide programming for underserved foreign language audiences, children and senior citizens. Sirius differentiated its proposed business model from that of terrestrial radio, stating that "traditional radio is a *local service* attracting local advertising, while Satellite Radio is an *inherently national service.*"[7] Similarly, another DARS applicant who ultimately did not prevail in the auction, assured the Commission that "[r]ather than competing with broadcasters, DARS will provide services that are complementary to conventional broadcasting ...the delivery of radio services by satellite is *primarily a national service* whereas conventional radio is a local medium ... other services that consumers demand, including local news, *weather*, *traffic*, sports and personalities, *can only be provided by local radio stations.*"[8] At no time during this period did any SDARS proponent discuss the possibility of distributing local content to its subscribers.

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[6] *Id.* at ¶ 23.

[7] In the Matter of Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Comments of CD Radio, Inc., Docket No. 90-357, Jan. 3, 1995 at 6 (emphasis added).

[8] In the Matter of Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Comments of Digital Satellite Broadcasting Corporation, Docket No. 90-357, Jan. 4, 1995 at 6 (emphasis added).

A. The 1995 Rulemaking Clearly Contemplated A National-Only Radio Service.

Based upon the SDARS proponents' promises of a unique and complementary radio service, in June 1995 the FCC issued a *Notice of Proposed Rulemaking*.[9] Specifically, the Commission stated that the public interest could be served because:

> By offering a *nationally based service*, SDARS providers could target niche areas that have not been served by traditional radio but now could be served as an aggregate national audience. Such specialized programming could include foreign language programming, music formats not carried by radio broadcasts, and programming geared to children or senior citizens.[10]

The Commission also made two initial findings. First, terrestrial broadcasters would not "necessarily" be adversely affected by the introduction of "30 or more channels of national digital audio programming"[11] because, *unlike SDARS*, terrestrial broadcasting "has the ability to provide local public affairs programming, local news and *weather, local traffic* reports and local personalities."[12] Second, "[the FCC] believe[s] that even with spot beams, local news, *weather, traffic* and public affairs programming *could not practically be provided* via satellite DARS."[13] Thus, the Commission did not believe that it would be technologically feasible for SDARS to provide local programming. Despite these assurances by SDARS proponents of the national character of SDARS service, the Commission solicited comments on the impact national satellite service would have on terrestrial broadcasting, particularly on small market broadcasters, local

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[9] In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Notice of Proposed Rulemaking*, IB Docket No. 95-91, 11 FCC Rcd 1 (1995) ("*NPRM*").

[10] *Id.* at ¶ 2.

[11] *Id.*

[12] *Id.* at ¶ 4 (emphasis added).

[13] *Id.* at ¶ 19 (emphasis added).

listeners, the delivery of local information, and the public interest.[14] Because the FCC concluded that the service was national-only, it declined to make a finding as to these harms.

B. In Their 1995 Comments, The SDARS Applicants Continued To Promise To Deliver A National-Only Satellite Radio Service.

Throughout the rulemaking, SDARS applicants continued to state that their services' programming scope was national-only, and that their services would provide foreign language programming and other niche audience programming to underserved persons and areas, distinct from the services provided by local radio stations. Specifically, XM stated:

> By its nature, DARS is a nationwide service that *will not carry local news and information*. It therefore is at a significant competitive disadvantage against local stations which have the ability to carry local news, sports, *weather*, and *other local information* which the Commission itself has repeatly found to be a desirable form of programming that is in the public interest (both literally and figuratively).[15]
>
> If a broadcaster finds that it is losing listeners to a national service like DARS, the broadcaster, being a good competitor, would shift its emphasis from national to *local programming*. By doing so, the broadcaster would be able to attract the many locally-oriented *listeners for which DARS cannot compete.*[16]

Similarly, Sirius asserted that it would deliver only national content and thus would not pose any economic threat to traditional radio or loss of local terrestrial service for the public. Sirius stated the following:

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[14] *Id.* at ¶¶ 2,17-19.

[15] In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Comments of American Mobile Radio Corporation, IB Docket No. 95-91, Sept. 15, 1995 at 18. At that time XM estimated "its two satellite system to transmit between 36 and 44 'CD quality' channels." *Id.* at 25.

[16] In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Reply Comments of American Mobile Radio Corporation, IB Docket No. 95-91, Oct. 15, 1995 at 7 (emphasis added).

[S]atellite radio is an inherently national service and *therefore offers no competitive threat whatsoever* to traditional radio stations' local programming strengths, such as local news, *weather, traffic*, school closings, personalities, spots, talk and the like.[17]

Basic economic analysis indicates that the advent of satellite DARS will prompt terrestrial broadcasters to strengthen their signature local news, *weather, traffic* and spots programming. In an increasingly competitive radio market, traditional broadcasters' *unique selling point* for both advertisers and listeners have and *will continue to be* the provision of local content.[18]

Satellite providers have powerful incentives to offer *distinct*, innovative programming *that is not available to radio consumers today.*[19]

It would not be economically efficient to 'cannibalize' market share by filling satellite capacity with *duplicative mass-market programs*, because this will not materially add to the total subscriber base. Instead, the successful satellite DARS Provider will identify groups of citizens who are *underserved* by such fare and will creatively develop programming that meets those groups' needs and tastes.[20]

If DARS is a nationwide service, however (as CD Radio has consistently supported), the impact on local broadcasters will be virtually nonexistent.[21]

The Docket 80-90 drop-ins (new FM stations) were, by definition, local stations that mostly *served targeted community needs*. As a *national service*, satellite DARS simply cannot meet this demand.[22]

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[17] In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Comments of CD Radio, Inc., IB Docket No. 95-91, Sept. 15, 1995 at 73 (hereinafter "CD Radio Comments"); *see also Satellite Radio, Good for U.S. Consumer, good for U.S. Radio, Good For U.S. Industry*, Attached to CD Radio, Inc.'s comments, which reiterates "[s]atellite radio? a national service? offers no competitive threat at all to local strengths of traditional radio? local news, *weather, traffic*, school closings personalities, sports, talk, etc." Id. at Appendix A, page 1 (emphasis added).

[18] CD Radio Comments at 54.

[19] *Id.* at 50.

[20] *Id.* at 49.

[21] In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Reply Comments of CD Radio, Inc., IB Docket No. 95-91, Oct. 13, 1995 at 42 (emphasis added).

[22] *Id.* at 28.

Thus, not only did the SDARS applicants promise to provide unique programming, they expressly stated they would not disseminate local content, including traffic and weather information, and the FCC relied upon these assertions in authorizing satellite radio service.

C. NAB Demonstrated The Harm SDARS Posed To Existing Local Service.

In response to the *NPRM*, NAB conducted extensive studies which showed the economic harm a national satellite radio service would have on local broadcasters and their ability to serve their local communities.[23] In analyzing six small markets for competition availability and diversity, the SPR Study concluded that "[s]tations licensed to these [s]mall markets play a vital role in the life of the communities they serve, providing an important forum for discussion of significant issues of public importance, a productive catalyst for organization of community affairs, local charity and social action, and an effective vehicle for dissemination of many different types of information of interest to diverse groups within the local community."[24] The SPR Study, along with a study provided by Kagan Media Appraisals, are replete with evidence of the relative fragility of local radio service and how it could be severely impacted by diversion of the audience to SDARS.[25] As discussed below, however, two years later the Commission declined to comprehensively address NAB's studies, based in large part on the SDARS applicants' repeated assurances that they would not transmit local content.

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[23] *See* Local Perspectives on Localism in Broadcasting and the Adverse Impact of Satellite DARS, John Haring and Harry M. Shooshan III, Strategic Policy Research, Sept. 12, 1995, attached as Appendix A to NAB Comments ("SPR Study").

[24] *Id.* at 10-16.

[25] The Economic Impact of Satellite-Delivered Radio on Local Radio Stations, Kagan Media Appraisals, Inc., Aug. 31, 1995, Attachment 9 of NAB Comments.

III. The 1997 SDARS Authorization Was Premised on the Public Policy Interest of Ubiquitous, National Programming.

In 1997 the Commission authorized SDARS and formally limited the auction to the 1992 applicant pool.[26] It is clear from the language of the *R&O/FN* that the Commission envisioned SDARS to be a ubiquitous, national-only programming service. Indeed, the Commission determined that (1) because local content would be unique to terrestrial broadcasters, and (2) because a majority of advertising dollars on radio stations flowed from local advertising, the economic impact to terrestrial broadcasters and their ability to provide valuable public services would not be severely impacted. Specifically, the Commission stated that "[c]ompetition from satellite DARS may create incentives for at least some terrestrial stations to increase their *emphasis on local programming in order to differentiate* their service from satellite DARS.[27] In explaining that its focus was geared towards whether SDARS would "impact the provision of locally originated service," the Commission echoed the SDARS applicants' repeated promises that their programming would be limited to national-only: "Satellite DARS proponents argue that the ability to *offer local content will give terrestrial broadcasters a competitive advantage*."[28] The SDARS licensees' efforts to provide local programming, if allowed to continue, undermine this core assumption by the Commission.

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[26] Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754 (1997) ("*R&O/FN*").

[27] *Id.* at ¶ 23.

[28] *Id.* at ¶ 29.

Further, the Commission made the following determinations about the impact SDARS service would have on terrestrial radio advertising revenues. First, a large share of the national radio audience would not have SDARS receivers, at least for a significant period of time.[29] Second, the impact of SDARS on terrestrial radio revenue would be "relatively small and occur over a long period of time." *Id.* Third, the Commission had "*no evidence that satellite DARS would be able to compete for local advertising.*"[30] Thus, the Commission determined that national radio programming would not significantly impact terrestrial radio services and, on that basis, authorized satellite radio service.

IV. The Commission Also Premised Its SDARS Allocation On The Public Policy Benefit of Distributing Unique Content To Underserved and Unserved Communities.

The Commission further articulated that any loss of local broadcasting would be offset by the public policy benefits SDARS will bring:

> [I]ntroduction of a new radio service to the public, a *national distribution of radio programming to all areas,* including underserved and unserved areas and population groups, the creation of jobs and the promotion of technological development in the satellite and receiver industries, and the improvement of U.S. competitiveness in the international community.[31]

The Commission, therefore authorized SDARS based upon the promises of nationally distributed unique and niche programming. Throughout the proceeding, the Commission's fundamental understanding of SDARS' purpose remained unchanged: the "principal benefits" in return for any possible loss of local programming would be "service to markets either unserved or underserved because of geographical, social or economic considerations, including minority

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[29] *Id.* at ¶ 23.

[30] *Id.*

[31] *Id.* at ¶ 7.

ethnic and cultural interests that otherwise might not receive programming directed to a narrow audience."[32]

XM and Sirius, however, have largely failed to deliver on their promises to serve unserved and underserved communities. In light of XM and Sirius' improper decision to dedicate bandwidth for "local" traffic and weather programming, the Commission should now examine whether the SDARS applicants have made good on their repeated pledges to provide unique programming to "niche" audiences. As far back as 1994, Sirius proposed "channels that could be devoted to ethnic formats featuring Chinese, Greek, Japanese, Jewish, Filipino, Portuguese, Korean, Polish, Italian programming, as well as to cultural and music formats featuring Children's, Reggae, Literature/Drama, Folk and Polka programming."[33] Notably absent from either XM or Sirius' lineup is any meaningful amount of this promised programming.[34]

Indeed, the majority of XM and Sirius' lineups are *music* channels that are essentially are duplicative of formats offered by terrestrial radio, albeit broken down by channels into

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[32] In the Matter of Amendment of the Commission's Rules with Regard to the Establishment and Regulation of the New Digital Audio Radio Services, Report and Order DARS Allocation Order 10 FCC Rcd 2310, 2311-12, 2314 at ¶¶ 9-11, 22 (1995).

[33] *See* "*Satellite Radio*," attached to CD Radio, Inc.'s *Ex Parte* filing, Sept. 7, 1994 at 24-27; *see also* In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Comment of CD Radio, Inc., Attachment A at 24-26 (the intended picture of this attached study was that Sirius would provide a Chinese channel, a Greek channel, a Japanese Channel, a Jewish Channel, a Filipino channel, a Portuguese channel, a Korean channel, a Polish channel and an Italian Channel). *See also* In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Reply Comments of AMRC, Oct. 15, 1995 at 15 (in which XM declared that SDARS would "provide a diversity of programming currently unavailable to much of the country.")

[34] *See* http://www.siriusradio.com/ (last visited March 23, 2004), http://www.xmradio.com/programming/full_channel_listing_print.jsp?sort=number (last visited March 23, 2004).

subcategories by music genre. Specifically, XM offers 68 channels of music, including 7 country music stations, 6 pop stations dedicated to offering music distinguished by decade, 10 "hit" or pop music stations, 15 rock stations, 7 urban formats, 7 jazz and blues stations, 4 dance stations, 2 Latin music stations, 3 Christian music stations, and 4 world music stations.[35] Sirius offers 63 music channels, including 12 pop channels, 16 rock channels, 6 country channels, 4 hip-hop channels, 5 "R&B/Urban" channels, 5 "Dance/Electronic" channels, 6 "Jazz/Standard" channels, 3 classical channels, and 4 "Latin & World" channels.[36]

Further, while XM and Sirius each devote 2 channels to children's programming, and XM does include one channel of "Audio Books and Radio Dramas,"[37] SDARS licensees devote substantially more bandwidth to sports programming.[38] Further, there are no channels dedicated to senior citizens – a large population which the Commission identified (through the repeated promises of the SDARS applicants) as a group that would benefit from targeted satellite radio programming.[39] Moreover, contrary to the SDARS applicants' much-touted promise of multiple foreign language and ethnic programming formats, the only foreign language channels listed are Spanish, unlike the widely available terrestrial local ethnic radio programming, which includes Chinese, Greek, Japanese, Jewish, Filipino, Portuguese, Korean, Polish, Italian, etc., programming.

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[35] *See* http://www.siriusradio.com/ (last visited April 13, 2004).

[36] *See* http://www.xmradio.com/programming/full_channel_listing_print.jsp?sort=number (last visited April 13, 2004).

[37] *Id*.; *see also* http://www.siriusradio.com/ (last visited April 13, 2004).

[38] *Id.* XM lists 5 channels and Sirius lists 7 sports programming channels on their respective lineups.

[39] See *NPRM* at ¶ 2.

Instead of fulfilling their commitments to serve children, senior citizens, ethnic and foreign language communities, XM and Sirius have devoted their bandwidth to variations on traditional, mainstream programming. Further, instead of opting to utilize compression technology to serve these communities, SDARS licensees will now downgrade the audio quality of even these music channels in order to replicate traffic and weather formats of terrestrial broadcasters. Once more, XM and Sirius fail to deliver the countervailing public interest benefits they promised. This shirking of responsibility is even more egregious, given that through technological advances, XM and Sirius were each able to expand a 30 channel lineup to 100 channels by their respective launch dates, without further examination by the Commission of (1) whether the expanded-channel lineup would include the promised niche programming; or (2) its effect on local broadcasting services.[40] Thus, NAB strongly encourages the Commission to declare that XM and Sirius are evading the basic policy foundation upon which satellite radio service was allocated.

V. Despite The SDARS Licensees' Repeated Pledges Not To Use Terrestrial Repeaters To Distribute Locally-Differentiated Content, XM Actively Sought Both the Patent And The Technology To Do So.

When the Commission concluded that the harm to broadcasters evidenced in the record did not outweigh the benefits of a national radio service for unserved and underserved

[40] XM and Sirius have already demonstrated a pattern of stating one position, and then developing technology to do precisely the opposite. For example, when Sirius filed its Aug. 14, 1998 quarterly 10-Q report with the Securities and Exchange Commission, it indicated substantial technical changes to its satellite and terrestrial repeater configuration, yet had not notified the Commission of these changes or sought to amend its application. *See* Letter from Henry L. Baumann, Executive Vice President, NAB to Magalie R. Salas, Secretary, FCC, IB Docket No. 95-91, Oct. 18, 1998. And as discussed in detail in Section V, despite repeated promises that they had no interest in providing localized service, including traffic and weather, XM has already sought and received a patent to utilize its terrestrial repeaters to distribute locally-differentiated content. US 6,347,216 B1, entitled *Method and System for Providing Geographic Specific Services in a Satellite Communications Network.*

communities, it was not contemplating SDARS providing local programming (*i.e.*, traffic and weather) – but rather a national programming service. This is further evidenced by the Commission's tentative conclusion "to prohibit the use of terrestrial repeaters to transmit locally originated programming *which would be inconsistent with the allocation of this spectrum.*"[41] Concurrent with their promises to deliver national, not local content, XM and Sirius have repeatedly avowed that they would not use terrestrial repeaters to deliver locally originated programming.[42]

It is appropriate that since 1997 all parties in this proceeding have primarily focused their efforts towards resolving the single issue pending in the *Further Notice*, namely, final service rules for SDARS terrestrial repeaters. In authorizing SDARS service, the Commission stated that the sole purpose of terrestrial repeaters is the retransmission of information from the satellite

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[41] *Id.* at ¶ 142.

[42] "In fact, Sirius proposed the rule prohibiting local origination of programming, which was subsequently echoed by the Commission." In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Comments of Sirius Satellite Radio, Inc., IB Docket No. 95-91, Oct. 13, 1995 at fn. 27. "Terrestrial devices will not be used to originate programming.... Terrestrial repeaters *will not change the essential nature* of the satellite DARS service." In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Comments of CD Radio, Inc. IB Docket No. 95-91, June 13, 1997 at 3. Application of Satellite CD Radio, Inc. For Authority to Construct, Launch and Operate a Space Station in the Satellite Sound Broadcasting Service, Supplement to Petition for Rulemaking, July 17, 1990, at 2, "use of terrestrial repeaters is essential to ensure the availability of uncompromised CD-quality stereo broadcasting service in heavily shadowed urban areas." Similarly, XM repeatedly asserted the same pledge: "XM Radio has consistently reasserted its intention that the repeaters will only simultaneously rebroadcast the programming from its satellites." In the Matter of Request of XM Radio Inc. for Special Temporary Authority to Operate Digital Audio Radio Service Terrestrial Repeaters, Reply Comment of XM Radio, Inc., FCC File Not. SAT-STA-2001-712-00063, Aug. 31, 2001 at 3; AMRC does not contest the Commission's proposed prohibition on the origination of local programming from terrestrial repeaters." In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Reply Comments of American Mobile Radio Corporation, IB Docket No. 95-91, June 27 1997 at 6.

signal in order to overcome "effects of signal blockage and multipath interference."[43] At that time, the Commission stated that rules governing SDARS use of terrestrial repeaters would require that the signals being transmitted by the repeater be received from the operating DARS satellites; the Commission also "tentatively concluded" to prohibit SDARS repeaters from transmitting locally-originated programming.[44]

Despite these repeated assurances, on February 12, 2002, the United States Patent Office issued XM patent number US 6,347,216 B1, entitled *Method and System for Providing Geographic Specific Services in a Satellite Communications Network*. As described in the patent, an XM terrestrial repeater "retransmits the composite signal [from the satellite] with a unique transmitter identification number which indicates the identity of the repeater." *Id.* at 1. XM was issued a patent for a process specifically designed to use terrestrial repeaters to "*provide geographically targeted broadcast data, such as weather, sports scores, advertisements and the like.*" *Id.* at 1-2. To put it bluntly, while XM was telling the Commission that it had no plans to use repeaters other than to fill gaps, it was actively developing technology specifically intended to use repeaters to provide locally differentiated material. This may explain the rapid increase in the number of terrestrial repeaters XM in particular has built. While to be sure, the issuance of the patent does not itself signify that XM intended to provide locally-differentiated service through its repeaters, the Commission must assume that XM did not invest substantial resources to develop this technology without intending to use it.

[43] *Id.* at ¶ 138.

[44] *Id.* at ¶¶ 140-42, 144.

In late 2003, XM agreed not to use its patent to distribute local content; we urge the FCC to adopt the no-local origination language jointly submitted by XM and NAB:

> repeaters rare restricted to the simultaneous transmission of the complete programming, and only that programming, transmitted by the satellite directly to the SDARS subscribers' receivers and may not be used to distribute any information not also transmitted to all subscribers' receivers.[45]

It is clear, however, that XM was willing to abandon the patent only because it had developed technology to deliver local content. By degrading their signal quality, XM and Sirius expanded their 100 channel lineups to about 120 channels. Less than two weeks after this agreement, XM announced that it would dedicate 21 channels to local traffic and weather and Sirius followed with a similar announcement soon thereafter. Thus, XM and Sirius have made clear that they intended to compete for new listeners not by providing services that are distinct from local radio, but instead by mimicking the unique features of local stations. Doing so is contrary to their commitments to the Commission, on the basis of which the Commission concluded that SDARS should be authorized. The Commission should declare that XM and Sirius' provision of local content is inconsistent with their licenses.

VI. The FCC Has Pledged Its Support Of Vibrant Local Broadcasting.

In authorizing SDARS, the Commission expressly left open the possibility of revisiting the question of harm to terrestrial broadcasters – it declared that "[a]lthough opponents of satellite DARS have not shown that it will have a sudden and dramatic adverse impact on terrestrial broadcasting, we cannot entirely rule out the possibility of a major adverse impact. *We emphasize that we remain committed to supporting a vibrant and vital terrestrial radio service*

[45] *See* Letter from Jack Goodman, Senior Vice President and General Counsel, NAB, and Lon Levin, Senior Vice President, XM, to Magalie Roman Salas, December 23, 2003 at 2.

for the public."[46] With the introduction of local traffic and weather service, the time to revisit this issue is now.

As discussed above, the Commission authorized SDARS on the understanding that, based on repeated promises of XM and Sirius, the harm to terrestrial broadcasters and the public interest would be *de minimis* because their services would not contain local content. Unlike in 1997, however, the Commission now has evidence that XM and Sirius intend to radically alter the SDARS landscape. In lieu of the promised niche audiences, foreign language services, senior and children's programming, they have instead devoted substantial bandwidth to compete directly with local broadcasters with local content, without being subject to any public interest obligations. This is not "local broadcasting" but instead centralized content stemming from two companies. Further, the Communications Act of 1934 calls for "providing a fair, efficient and equitable distribution of broadcast services." 47 U.S.C. § 2(a)(9). "Localized" pay service, implemented in stark contrast to both the promised "rules of the road," is inherently contrary to the goal of "fair and efficient" distribution of local broadcast services. A centralized "localized" service, which is essentially duplicative of existing programming, does little to foster diversity and localism: it can exist only to the detriment of the dissemination of free and over-the-air local services to local communities.

Fostering digital technology, diversity and competitiveness of local radio has been the direct result of public policy designed to expand local radio service, particularly in the smaller and medium markets. And the goal of localism has been pursued and reinforced by the Commission in its policies as to spectrum allocation, station licensing and even ownership.

[46] *Id.* at ¶ 33.

Congress similarly has steadfastly supported the promotion and extension of localism and local broadcast voices addressed to each community's needs and interests.[47]

The Commission understands that the radio "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[48] An earlier Commission's failure to appreciate this point lead to the Commission's ill-fated decision to add thousands of FM stations to the market in Docket 80-90. That decision – with its resulting widespread economic harm to local broadcast service – was the cause of the Commission's decision to allow greater levels of ownership consolidation in 1992 and Congress' mandate for further deregulation in the 1996 Telecommunications Act.[49] The Commission recognized "that the outlook for small radio stations, which comprise the bulk of the radio industry, is particularly bleak."[50] The Commission believed that satellite radio would not exacerbate these threats to local service because satellite radio would not compete with local broadcasters. XM and Sirius' plans to do precisely that will again weaken the economic foundations of local service. If that is allowed to occur, the responses surely must be either a loss of service or a need to find greater efficiencies in operations through increased consolidation.

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[47] *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("Turner II") (In which the Supreme Court found that congressional findings did not "support appellants' suggestion that legitimate legislative goals would be satisfied by the preservation of a rump broadcasting industry providing a minimum of broadcast service to Americans without [subscription services]"). And in passing the Cable Act of 1992, Congress identified a specific interest in "ensuring [the] continuation of" the "local origination of [broadcast] programming." *Id.* at 192.

[48] In re Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2760 (1992).

[49] *See* Haring & Shooshan, *LPFM: The Threat to Consumer Welfare*, Attachment C to Comments of NAB, In the Matter of Creation of a Low Power Radio Service, MM Docket No. 99-25 (filed Aug. 2, 1999).

[50] Revision of Radio Rules, 7 FCC Rcd at 2760.

Localism in practice helps bring people to their communities. Stations licensed in local markets play a vital role in the life of the communities they serve, providing an important forum for discussion of significant issues of public importance, a productive catalyst for organization of community activities, local charities and social actions, and an effective vehicle for dissemination of many different types of information of interest to diverse groups. Local broadcasters devote substantial resources to air PSAs, provide coverage of local news, events and political debates, provide detailed local emergency and public safety information, air AMBER Alerts, announce school closings and produce and air remote advertiser broadcasts for local businesses, none of which are aired on satellite radio.

Local service is an integral element, and a statutorily-mandated responsibility, of all terrestrial broadcast stations in the United States. Broadcast licenses are awarded for local operations, contingent upon a demonstration of providing continuing service directed to meeting the needs of the community served. Indeed, the Commission's Media Security and Reliability Council has recognized that since radio receivers are universally available and frequently battery-powered or located in automobiles, "radio broadcasters are likely to be the last line of defense for communicating with the public under extremely adverse conditions that could result in the event of a local disaster."[51] There is a substantial governmental interest in ensuring the continuation of this capability, and that local broadcasters, the backbone of emergency communications, are not unduly jeopardized.

Moreover, by limiting the applicant pool to those who had applied for SDARS licenses in 1992, the Commission premised the SDARS auction and the subsequent raising of eighty million dollars on the findings of its 1997 Report and Order, that four companies could compete for the

[51] Media Security and Reliability Council, Final Report of the Communications Infrastructure Security, Access, and Restoration Working Group (Feb. 25, 2004) at 21.

opportunity to provide national programming.[52] There is simply no equitable basis, however, for unjustly enriching two SDARS operations at the public's expense, by allowing to evade the fundamental premise upon which spectrum was allocated via technological advances. Therefore, the Commission must clarify that the policy basis of satellite radio authorization precludes providing local content, either through dedicated channels or through addressable receiver technology.[53]

Were XM and Sirius allowed to distribute local content, the net result would be that local, community-oriented programming which is usually the most expensive and least profitable component of small market radio fare, will be reduced. Thus, fulfilling the commitments made by XM and Sirius and the Commission's understanding in authorizing SDARS, the Commission should declare that SDARS providers are prohibited from: (1) using any technology to permit the delivery of content that would be aired on a receiver in one location that differs from the content

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[52] *R&O/FN* at ¶¶ 62-71.

[53] NAB is not advocating restrictions on speech: rather, technology cannot be wielded to circumvent regulations and the public policies behind such regulations. It is constitutionally appropriate that the Commission license a radio service with specified operating conditions. *See, e.g., Turro v. FCC*, 859 F.2d 1498, 1500 n.2 (D.C. Cir. 1988) (finding no First Amendment issues raised by FCC denial of a request for waiver of its rule prohibiting low power "translator" stations, which rebroadcast the signals of full power stations, from originating their own local programming). *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1975) (in which the Supreme Court rejected a First Amendment challenge to a Commission rule that barred the owners of newspapers from acquiring any broadcast stations in their communities, this rule completely barred a specified class of speakers from engaging in radio or broadcasting in communities either by license or by station. Thus, it is constitutionally permissible to prevent some persons from engaging in radio or television broadcasting services in their communities). *See Grid Radio v. FCC*, 278 F.3d 1314, 1321-11 (D.C. Cir.), *cert. denied*, 537 U.S. 815 (2002); *Free Speech ex. rel. Ruggerio v. Reno*, 200 F. 3d 63, 64 (2d Cir. 1999); *see also FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

that would be aired on a receiver in a different location; and (2) providing locally oriented services on nationally distributed channels.

VII. Conclusion.

For the above-stated reasons, NAB strongly urges the Commission to declare that, as a matter of public policy SDARS licensees are limited to distributing national content, and may not use technology to circumvent the fundamental premise of satellite radio spectrum allocation – to distribute solely national programming to benefit unserved and underserved communities.

Respectfully Submitted,

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